

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FILED/ACCEPTED

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Federal Communications Commission
Office of the Secretary

In the Matter of)
)
M2Z NETWORKS, INC.)
)
Application for License and Authority to)
Provide National Broadband Radio Service In)
the 2155-2175 MHz Band)
)
Petition of M22 Networks, Inc. for Forbearance)
Under 47 U.S.C. § 160(c) Concerning)
Application of Sections 1.945(b) and (c) of the)
Commission's Rules and Other Regulatory and)
Statutory Provisions)

WT Docket No. 07-16

WT Docket No. 07-30

REPLY OF CTIA - THE WIRELESS ASSOCIATION@

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EXECUTIVE SUMMARY

The Commission should move immediately to dismiss or deny M2Z's Application for a license in the 2155-2175 MHz band as well as M2Z's Petition for Forbearance. The Commission and other interested parties have diverted more than enough resources and time to address M2Z's flawed proposal. As a result of the many filings by M2Z and other parties, one thing has become clear—M2Z's plan would create a myriad of legal and public policy problems without effectively serving the public interest.

As an initial matter, M2Z plainly ignores the clear requirements of the Communications Act in its attempt to secure spectrum from the Commission outside of an open, competitive auction. Specifically, M2Z tries to bypass the Communications Act's Section 309(j)(1) requirement for competitive auctions by ignoring explicit Congressional directives and FCC precedent and by embracing erroneous interpretations of Section 309(j)(6)(E) and previous FCC proceedings. M2Z simultaneously attempts to reinvigorate licensing and payment schemes the Commission has explicitly rejected – specifically, the pioneer's preference program and installment payment plan. M2Z also improperly implores the Commission to provide M2Z a license before the agency and the public have a chance to develop the necessary service rules for the 2155-2175 MHz band. The Commission should reject M2Z's self-serving attempt to gain access to valuable spectrum outside of the auction process and instead provide M2Z, the other competing applicants for the 2155-2175 MHz band, and all other interested parties the opportunity to bid on this spectrum at auction.

In addition, M2Z improperly relies on Section 7 of the Communications Act as justification not only for granting its Application, but for doing so by May 5, 2007. Section 7 is merely a broad statement directing the Commission to consider new and/or novel services

utilizing newer technologies. Section 7 does *not* supersede Section 309(j)'s competitive bidding requirements **nor** does it mandate the grant of any **application that the applicant sweepingly** proclaims falls under this provision. Further, M2Z's proposed service and technology is plainly not new *or* novel, as contemplated by this provision.

M2Z's illusory public interest claims also are based on flawed assumptions and do not justify a Commission decision to subsidize a for-profit entity like M2Z with government subsidized access to spectrum based on a promise to pay later. Indeed, M2Z's proposal to deliver "free" wireless broadband services would be of limited benefit **as** such services – at higher speeds than M2Z proposes – are available today to the American public from a variety of sources. Finally, M2Z's allegations of procedural infirmities in the petitions to deny and competing applications are overstated or incorrect. Thus, they do not form a basis for the dismissal of these filings. For these reasons and those addressed by CTIA in earlier filings in this proceeding, **the** Commission should promptly deny or dismiss M2Z's Application for a license in the 2155-2175 MHz band and M2Z's Petition for Forbearance.

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REPLY OF CTIA - THE WIRELESS ASSOCIATION@

CTIA – The Wireless Association@’ (“CTIA”) respectfully submits this Reply in response to the Consolidated Opposition of M2Z Networks, Inc. to Petitions to Deny² and the Consolidated Motion of M2Z Networks, Inc. to Strike and Dismiss Petitions to Deny and Alternative Proposals that were filed on March 26, 2007.³ CTIA files this Reply on behalf of its members who purchased at auction Personal Communications Service (“PCS”) and Advanced

¹ CTIA – The Wireless Association@ is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the organization covers Commercial Mobile Radio Service (“CMRS”) providers and manufacturers, including cellular, advanced wireless services, broadband PCS, and ESMR, as well as providers and manufacturers of wireless data services and products.

² Consolidated Opposition of M2Z Networks, Inc. to Petitions to Deny, WT Docket Nos. 07-16, 07-30 (filed Mar. 26, 2007) (“M2Z Opposition”).

³ Consolidated Motion of M2Z Networks, Inc. to Strike and Dismiss Petitions to Deny and Alternative Proposals, WT Docket Nos. 07-16, 07-30 (filed Mar. 26, 2007) (“M2Z Motion”).

Wireless Service (“AWS”) licenses that would compete in the same geographic and product space with M2Z, *and who would be harmed by* a Commission decision to distort *the* competitive market for commercial wireless services by providing M2Z with free (or installment payment-based) spectrum in lieu of conducting open, competitive auctions.⁴

In its Opposition, M2Z repeats its request that the FCC provide M2Z with a 15-year exclusive, nationwide license for the entire 2155-2175 MHz band. M2Z also reiterates its pledges to build out a nationwide wireless broadband network to a percentage **of** the country over a 10-12 **year period**, to pay the U.S. Treasury five percent of the gross revenues generated from M2Z’s broadband subscription services, and to provide government subsidized (advertiser-driven) broadband services to the public.

CTIA requests that the Commission dismiss or deny M2Z’s Application because M2Z’s plan would create a number of legal and public policy problems without effectively serving the public interest. First, M2Z’s plan ignores the clear requirements of the Communications Act of 1934, as amended (“Communications Act”), and FCC precedent that call for an auction and the promulgation of service rules for the 2155-2175 MHz spectrum band. Second, M2Z improperly attempts to use the general provisions of Section 7 of the Communications Act to seize this spectrum, even though the technologies and services M2Z proposes are by no means new or novel. Third, M2Z’s public interest claims are based on flawed assumptions, and do not warrant a Commission decision to subsidize a for-profit entity like M2Z with free access to spectrum. Finally, M2Z’s allegations of procedural infirmities in the Petitions to Deny and competing Applications are overstated and do not warrant the dismissal of these filings.

⁴ CTIA reiterates that it has standing based on associational standing principles. *See* CTIA – The Wireless Association® Petition to Deny, WT Docket No. 07-16, n.4 (filed Mar. 2, 2007) (“CTIA Petition to Deny”).

I. M2Z MISREADS AND IGNORES THE CLEAR REQUIREMENTS OF THE COMMUNICATIONS ACT AND FCC PRECEDENT REGARDING SPECTRUM LICENSING.

M2Z ignores the clear requirements of the Communications Act in its attempt to secure subsidized spectrum from the Commission outside of an open, competitive auction. Specifically, M2Z tries to bypass the Communications Act's Section 309(j)(1) requirement for competitive auctions by ignoring explicit Congressional directives and FCC precedent and by embracing erroneous interpretations of Section 309(j)(6)(E) and previous FCC proceedings. M2Z simultaneously attempts to reinvigorate licensing schemes the Commission has explicitly rejected – specifically, the pioneer's preference program and installment payment plan. Finally, M2Z improperly implores the Commission to provide M2Z a license before the agency and the public have a chance to develop the necessary service rules for the 2155-2175 MHz band.

A. Section 309(j) Compels an Auction for the 2155-2175 MHz Band.

As CTIA and the other petitioners explained, M2Z attempts to skirt the competitive bidding process that Congress and the FCC have determined to be the most effective mechanism for assigning spectrum. Specifically, M2Z's proposal to obtain 20 MHz of spectrum outside of a competitive auction conflicts with Section 309(j)(1), which compels the Commission to assign spectrum through competitive bidding when faced with mutually exclusive applications.⁵ In this case, six entities have submitted competing applications⁶ in response to the Commission's *Public*

⁵ 47 U.S.C. § 309(j)(1).

⁶ See, e.g., Application of CommNet Wireless, LLC, WT Docket No. 07-16, Exhibit 7 (filed Mar. 2, 2007); Application of McElroy Electronics Corp., WT Docket No. 07-16, Exhibit 1, pg. 1 (filed Mar. 2, 2007); Application of NetfreeUS, LLC, WT Docket No. 07-16, 17 (filed Mar. 2, 2007); Application of Open Range Communications, Inc., WT Docket No. 07-16, 1 (filed Mar. 1, 2007); Application of NextWave Broadband, Inc. for License and Authority to Provide Nationwide Broadband Service in the 2155-2175 MHz Band, WT Docket No. 07-16 (filed Mar. 2, 2007); Application of Towerstream Corp. for a Nationwide 2155-2175 MHz Band Authorization, WT Docket No. 07-16 (filed Mar. 15, 2007).

Notice noting that additional applications could be filed.’ In light of these competing applications, Section 309(j)(1) and the public interest compel the *Commission to* auction the 2155-2175 MHz spectrum and dismiss M2Z’s Application. In a March 16, 2007 filing with the Commission, CTIA highlighted this issue and called on the Commission to auction the spectrum.

Contrary to M2Z’s assertions? CTIA fully believes that the Commission should assign the 2155-2175 MHz band in a manner that promotes the highest and best use of this spectrum. As Congress and the FCC both have recognized, this goal is best achieved by utilizing competitive bidding mechanisms to assign new spectrum licenses.⁹ The auction process ensures that scarce spectrum resources are put to their highest and best use by affording all interested parties an opportunity to compete for the new authorizations made available by spectrum reallocations.¹⁰ The assignment of spectrum to the highest bidder ensures that spectrum is

⁷ See *Wireless Telecommunications Bureau Announces that M2Z Networks, Inc.’s Application for License and Authority to Provide a National Broadband Radio Service in the 2155-2175 MHz Band Is Accepted for Filing*, Public Notice, 22 FCC Rcd 1955 (2007).

⁸ M2Z Opposition at vi (“The parties opposing the Application . . . are not motivated by a desire to bring the highest and best services to American Consumers”).

⁹ See Budget Reconciliation Act, P.O. 103-66, Legislative History, House Report No. 103-111 (1993) (“A competitive bidding system . . . will encourage innovative ideas, and give proper incentive to spur a new wave of products and services that will keep the United States in a competitive position”); *NextWave Personal Communications, Inc. and NextWave Power Partners Inc. (Petition for Reconsideration Public Notice DA 00-49 Auction of C and F Block Broadband PCS Licenses)*; *In re Settlement Request Pursuant to DA 99-745 For Various Broadband PCS C Block Licenses*, Order on Reconsideration, 15 FCC Rcd 17500, ¶ 27 (2000) (“*NextWave*”); *Amendment of Part 90 of the Commission’s Rules to Facilitate Development of SMR systems in the 800 MHz Frequency Band*, Memorandum Opinion and Order on Reconsideration, 12 FCC Rcd 9972, ¶¶ 108, 110, 115 (1997) (“*SMR Order*”).

¹⁰ See *NextWave* at ¶ 27 (“Section 309(j) embodies a presumption that licenses should be allocated as a result of an auction to those who place the highest value on the use of the spectrum. Such entities are presumed to be those best able to put the licenses to their most efficient use”); *SMR Order* at ¶¶ 108, 110, 115 (reaffirming that competitive bidding would “further the public interest requirements of the Communications Act by promoting rapid deployment of services, fostering competition, recovering a portion of the value of the spectrum

awarded to the entity that values it most highly, has the financial resources to put it to good use, and has the incentive to utilize it efficiently. In addition, **the auction proceeds enable the** government to support much-needed programs and services. In contrast, subsidizing a commercial entity like M2Z with spectrum outside of an open, competitive auction does not honor congressional intent. As discussed below, the illusory benefits offered by M2Z do not alter this public interest analysis.” Although M2Z has argued that its Application represents the “only legitimate proposal” to serve the public interest,¹² M2Z’s conclusion is completely inconsistent with Congress’s directive in Section 309(j)(1) to utilize auctions to assign this spectrum.

M2Z’s novel suggestion that Section 309(j)(6)(E)¹³ somehow trumps Section 309(j)(1)’s competitive bidding requirements should be ignored. M2Z’s reference to Section 309(j)(6)(E) to justify its position that the Commission has a duty to avoid mutual exclusivity is deeply flawed and contrary to Commission precedent. The Commission previously has explained that Section 309(j)(1)’s cross-reference to Section 309(j)(6) does not “turn avoidance of mutual exclusivity into the paramount goal of the statute.”¹⁴ Section 309(j)(6)(E) simply reminds the Commission that “engineering solutions, negotiation, threshold qualifications, service regulations, and other

(Continued. . .)

for the public, and encouraging efficient use of spectrum”).

¹¹ *See infra* Section III

¹² *See* M2Z Opposition at 12.

¹³ 47 U.S.C. § 309(j)(6)(E).

¹⁴ *Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as Amended*, Report and Order and Further Notice of Proposed Rule Making, 15 FCC Rcd 22709, ¶ 22 (2000).

means” may be used to benefit the public interest.¹⁵ This provision cannot be read to unravel the competitive bidding mandate that Congress made clear in Section 309(j)(1), nor **does** this provision justify a Commission decision not to accept other legitimate spectrum applications.

Moreover, M2Z fails to refute the controlling Northpoint precedent, in which the Commission rejected a similar proposal to ignore Congress’s auction directive for initial commercial licenses.¹⁶ In that case, *the* Commission determined that it was required to award applications for initial Multichannel Video Distribution and Data Service (“MVDDS”) spectrum through competitive bidding because the filing of mutually exclusive applications **was** possible and was in the public interest.” The Commission concluded that “awarding licenses to [bidders] that value them most highly fosters Congress’s policy objectives because those bidders are **more** likely to rapidly introduce new and valuable services and deploy those services **quickly**.”¹⁸ The Commission also expressly asserted that Section 309(j)(6)(E) did not alter this public interest determination.¹⁹ This precedent is directly on point and requires the **use** of competitive bidding to assign initial licenses for the 2155-2175 MHz band. That applications mutually exclusive with M2Z’s proposal have been filed makes the case for **an** auction even more compelling.

¹⁵ 47 U.S.C. § 309(j)(6)(E).

¹⁶ *See Amendment of Parts 2 and 25 of the Commission’s Rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-Band Frequency Range; Amendment of the Commission’s Rules to Authorize Subsidiary Terrestrial Use of the 12.2-12.7GHz Band by Direct Broadcast Satellite Licensees and Their Affiliates; and Applications of Broadwave USA, PDC Broadband Corporation, and Satellite Receivers, Ltd. to Provide A Fixed Service in the 12.2-12.7GHz Band*, Memorandum Opinion and Order and Second Report and Order, 17 FCC Rcd 9614, ¶¶ 238-240 (2002) (“*Northpoint Proceeding*”).

¹⁷ *Id.*

¹⁸ *Id.* at ¶ 241.

¹⁹ *Id.* at ¶¶ 239-240

M22 ignores Northpoint, and instead, analogizes to several proceedings that are simply not relevant to the instant situation. The 800 MHz re-banding proceeding;²⁰ the Instructional Television Fixed Service (“ITFS”) proceeding;²¹ and the Mobile Satellite Service (“MSS”) proceeding²² all involved the modification of existing licenses or the grant of additional rights to existing licensees, not the award of an initial license for spectrum **as** contemplated by M2Z’s Application. M2Z’s citation of certain cases involving “additional services,”²³ including the Wireless Medical Telemetry Service, the Dedicated Short Range Communications Service, the 3650-3700 MHz band and the 70/80/90 GHz band, is also inapposite as these all involved shared use of spectrum – such shared use cannot give rise to mutually exclusive applications and thus is not subject to the requirement.²⁴ Finally, M2Z’s discussion of the initial Direct Broadcast Satellite licenses distributed without auctions “[p]rior to the end of 1995, but after the 1993 enactment of the competitive bidding provisions in Section 309(j)” is misleading.²⁵ In this case, the Commission simply continued the existing licensing process adopted prior to Congress’s grant of auction authority, which provided existing DBS permittees with first rights to additional

²⁰ See M2Z Opposition at 55; *Improving Public Safety in the 800 MHz Band*, Report and Order, 19 FCC Rcd 14969, ¶ 5 (2004). Importantly, these modifications were necessary to correct harmful interference into critical public safety communications networks, a fact that is clearly not present in this circumstance.

²¹ See M2Z Opposition at 57-58.

²² See *Amendment of Part 25 of the Commission’s Rules to Establish Rules and Policies Pertaining to the Second Processing Round of the Non-Voice, Non-Geostationary Mobile Satellite Service*, Report and Order, 13 FCC Rcd 9111, ¶ 122 (1997).

²³ See M22 Opposition at 60.

²⁴ See 47 C.F.R. §§ 95.1111, 90.375, 90.1307, 101.1501.

²⁵ See MZZ Opposition at 58.

reading of its Application makes clear that it is indeed trying to reinvigorate this rejected licensing program. M2Z implores the Commission to provide it with an extremely valuable license without being **subject** to competing applications because M2Z believes that its service and **business plan** could improve nationwide broadband access. This is plainly a request for a pioneer's preference, despite M2Z's attempt to distance itself from the program. M2Z's request, however, faces two insurmountable problems. First, M2Z's Application does not propose a pioneering technology, nor does it demonstrate that it could bring a service or technology to a more advanced state.³⁰ Indeed, there **are** a number of providers already offering wireless broadband services, most at speeds faster than M2Z proposes." Even M2Z admits that it is not appealing to the Commission to approve its Application based on the nature of the technology or services it **proposes**.³² Second, in 1997, Congress eliminated **the** FCC's authority to grant pioneer's preferences.³³ Accordingly, this policy is no longer available as an assignment mechanism and does not support M2Z's Application.

Further, M2Z's proposal to make a five percent payment from its subscription service to the government over time for exclusive access to the 2155-2175 MHz spectrum band resembles troubling installment payment policies, most prominently demonstrated in the C Block auction.

³⁰ *Review of the Pioneer's Preference Rules*, Second Report and Order and Further Notice of Proposed Rulemaking, 10 FCC Rcd 4523, ¶¶ 1-2 (1995).

³¹ *See* CTIA Petition to Deny at 11-12.

³² *See* M2Z Opposition at 69-70.

³³ Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251 (1997). The FCC has adhered to Congress' **ban** on pioneer preference grants. Specifically, the Commission refused to assign Northpoint Technology, Ltd. a license without the use of competitive bidding—even though Northpoint claimed that it could serve the public interest through its innovative communications technology—because “such action would be inconsistent with Congress's intent in abolishing the Pioneer's Preference program.” *See Northpoint Proceeding* at ¶ 241.

As CTIA explained in its Petition, the installment payment programs failed terribly, exemplified most acutely **by** the extensive litigation in which the FCC was engaged with NextWave Telecom (“NextWave”).³⁴ M2Z’s payment proposal strongly resembles the NextWave installment **payment mechanism**. **Although M2Z** denies that its proposal bears “any rational link” to the installment payment **program**,³⁵ M2Z simply cannot dismiss the fact that its license will be conditioned on the “value-for-value provision” of recurring annual payments to the **government**.³⁶ Indeed, M2Z proposes an even more uncertain proposition than the failed installment payment program. At least under the installment payment program, the FCC could monitor an established payment plan; here, M2Z does not commit to pay a specified amount over a specific time-period, only to give 5 percent of the revenues from a service with no guarantee of revenue generation.

M2Z also fails to rebut that **the** five percent installments that M2Z proposes to pay effectively make the FCC **an** “equity investor” in M2Z’s venture—in exchange for the contribution of an asset to the business, the FCC will derive **an** equity return. In fact, M2Z repeatedly states that as “M2Z derives additional revenue from the license, so will the U.S. Treasury.”³⁷ M2Z seeks to place the FCC in a potential conflict due to its primary role **as** a neutral government regulator because the U.S. Treasury’s funds would be directly tied to M2Z’s success. The FCC should be wary of such a relationship with a licensee and, accordingly, should reject M2Z’s plan and payment proposal.

³⁴ See CTIA Petition to Deny at 7.

³⁵ See M2Z Opposition at 72.

³⁶ See *id.* at 14.

³⁷ See *id.* at 105.

C. The Commission Should Not Grant an Application for This Spectrum Until It Adopts Service Rules.

M2Z claims that the *Commission should* move forward to grant its application before adopting service rules for the 2155-2175 MHz band.³⁸ The Commission should reject this request. As past Commission practice indicates, it is imperative that the Commission lay the ground rules for operation in a given band before permitting operation in that band. Moreover, the Administrative Procedures Act (“APA”) requires that the Commission provide adequate notice of its intention to adopt such rules, and the Commission has not provided notice in its Public Notices on M2Z’s application.

The Commission’s historic practice has been to initiate a formal rulemaking to adopt service rules for a given spectrum band prior to authorizing operation in the band.³⁹ These service rules include operational specifics that ensure that harmful interference will not occur to co-channel or adjacent licensees and that displaced incumbents are equitably and expeditiously relocated. Further, service rules determine the appropriate number and scope of licenses in a particular band, as well as other types of service requirements that ensure the public will be best served. A formal rulemaking provides an opportunity for all interested parties to comment on these issues in order to provide a full record for the Commission’s consideration.

The record in response to M2Z’s application is not sufficient for the Commission to establish the requisite service rules. Moreover, under the APA, the Commission must provide notice of “either the terms or substance of the proposed rule or a description of the subjects and

³⁸ See *id.* at 75-84.

³⁹ See, e.g., *Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands*, Report and Order, 18 FCC Rcd 25162, ¶ 1 (2003) (adopting “service rules for Advanced Wireless Services (AWS) in the 1710-1755 and 2110-2155 MHz bands, including provisions for application, licensing, operating and technical rules, and for competitive bidding.”).

issues involved.”⁴⁰ The Commission’s Public Notice seeking comment on M2Z’s Application did not provide the required information, nor did it indicate that the Commission would act to adopt such rules in this proceeding. Indeed, the Commission previously stated its intention to initiate a separate rulemaking for the 2155-2175 MHz band.⁴¹ Thus, the Commission cannot and should not adopt service rules in this limited, adjudicatory proceeding. Rather, it should undertake a rulemaking for that purpose.

II. M2Z’S APPLICATION DOES NOT QUALIFY AS A NEW SERVICE OR TECHNOLOGY APPLICATION UNDER SECTION 7 OF THE ACT

In its Opposition, M2Z attempts for the first time to assert that Section 7 of the Communications Act not only provides a basis for granting its Application, but for doing so by May 5, 2007.⁴² M2Z, however, grossly misunderstands the purpose and goals of Section 7.

As an initial matter, the courts and the Commission have repeatedly characterized Section 7 as a broad policy statement, rather than an affirmative obligation with which the Commission must comply. For example, the Fifth Circuit has described Section 7 as “merely a broad statement of policy conferring substantial discretion on the Commission to determine how best to provide for new technologies and services.”⁴³ Similarly, the Commission has noted that Section 7 is “a broad policy statement reflecting congressional delegation on policy matters to the

⁴⁰ 5 U.S.C. § 553(b)(3).

⁴¹ *See Amendment of Part 2 of the Commission’s Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, Including Third Generation Wireless Systems*, Ninth Report and Order and Order, 21 FCC Rcd 4473, n.22 (2006) (“We note that we are not deciding here how to assign this new AWS spectrum at 2155-2175 MHz but will consider this issue in a separate service rules proceeding at a later date.”).

⁴² M2Z Opposition at 23-25,

⁴³ *Alenco Commc’ns, Inc. v. FCC*, 201 F.3d 608, 615 n.3 (5th Cir. 2000).

Commission's discretion."⁴⁴ Thus, Section 7 does not require the Commission to grant licenses to an applicant simply because the applicant invokes Section 7 or claims it could provide new services or technologies. Rather, it merely directs the Commission to consider whether an applicant will offer new and/or novel services utilizing newer technologies and whether such offerings will be in the public interest.

Second, Section 7 applies only to *new and novel* technologies and services. Section 7 "cannot be interpreted to endorse methods for the provision of existing services at additional locations, or the continued use of older, outmoded technologies."⁴⁵ Further, the Commission has specifically found that a technology will not be considered "new" if it "concerns the continued use, and extension of useful life, of an old technology in lieu of the use of a new technology."⁴⁶ Similarly, the Commission has found that a service is not "new" if it is merely being provided in an arguably new way.⁴⁷

M2Z's proposed service and technology are clearly not new or novel in any way, and certainly do not rise to the level of the new services and technologies contemplated by Section 7. In its Application, M2Z proposes to offer a wireless broadband service to consumers for "free"

⁴⁴ *Amendment of Parts 2, 25, and 87 of the Commission's Rules to Implement Decisions from World Radiocommunication Conferences Concerning Frequency Bands Between 28 MHz and 36 GHz and to Otherwise Update the Rules in this Frequency Range*, Order on Reconsideration, 21 FCC Rcd 5492, ¶ 15 (2006).

⁴⁵ *Southwestern Bell Telephone Company Revisions to Tariff F.C.C. No. 6*, Memorandum Opinion and Order, 6 FCC Rcd 3760, 131 (1991).

⁴⁶ *Id.* at ¶ 30.

⁴⁷ *Id.* at ¶ 31 (finding that the use of alternate technologies to provide equal access is not a "new service"). Thus, M2Z's plan to provide wireless broadband service for "free" does not convert it into a "new" service under Section 7.

throughout the United States.⁴⁸ Wireless broadband, however, is readily available throughout the country today, including in most rural areas. Indeed, wireless broadband services are the fastest growing of any broadband service⁴⁹ and currently are available in counties with 99.1 percent of the population for CDMA-based services and 94.3 percent of the population for GSM-based services.⁵⁰ In addition, the data rates that M2Z suggests (384 kbps for downlinks, 128 kbps for uplinks)⁵¹ are slower than the broadband data rates offered by CTIA's members.⁵² Similarly, M2Z's proposal to provide a TDD-based wireless broadband service is not new. Currently, both

⁴⁸ M2Z Networks, Inc., Application for License and Authority to Provide National Broadband Radio Service in the 2155-2175 MHz Band, WT Docket No. 07-16, 1 (filed May 5, 2006, amended Sept. 1, 2006) ("M2Z Application").

⁴⁹ In 2006, 59 percent of new broadband subscribers were wireless. *See High-speed Services for Internet Access: Status as of June 30, 2006*, FCC Wireline Competition Bureau, at 3-4 (Jan. 2007), available at <http://hraunfoss.fcc.gov/edocspublic/attachmatch/DOC-270128A1.pdf>. *See also* Press Release, CTIA – The Wireless Association® Releases Comprehensive Wireless Industry Survey Results, Mar. 28, 2007, at <http://www.ctia.org/mediapress/body.cfm/prid/168> (last visited Apr. 1, 2007).

⁵⁰ *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, Eleventh Report, 21 FCC Rcd 10947, Table 8: Mobile Telephone NextGen Coverage (2006) ("Eleventh Competition Report").

⁵¹ M2Z Application at 2.

⁵² *See, e.g.*, Petition to Deny of T-Mobile USA, Inc., WT Docket No. 07-16, 10 (filed Mar. 2, 2007) ("Today, cellular and PCS carriers offer EDGE, HSDPA, 1xRTT and EvDO services, all at rates much higher than the ones proposed by M2Z"). For example, Sprint Nextel is currently offering a wireless broadband service that provides 400-700 kbps for downlinks (with peak speeds as high as 2 Mbps) with announced plans to increase speeds by a factor of 10. *See* Press Release, Sprint Extends Mobility Leadership with Aggressive Broadband Network Expansion, Mar. 30, 2006, at http://www2.sprint.com/mr/news_dtl.do?id=11040 (last visited Apr. 2, 2007). Verizon Wireless and AT&T are providing wireless broadband speeds that are just as fast. *See* Verizon Wireless Home Page, Best Network Network Facts, at http://aboutus.vzw.com/bestnetwork/network_facts.html (last visited Apr. 2, 2007) ("BroadbandAccess customers in enhanced broadband wireless coverage areas can expect average download speeds of 600 kilobits per second (kbps) to 1.4 megabits and average upload speeds of 500-800 kbps."); *see also* Cingular Home Page, Our Technology, at <http://www.cingular.com/about/our-technology.jsp> (last visited Apr. 2, 2007).

Sprint Nextel⁵³ and Clearwire⁵⁴ are deploying and providing TDD-based wireless broadband services using their 2.5 GHz spectrum. For these reasons, the FCC should reject M2Z's inappropriate attempt to obtain preferential treatment by relying on Section 7

III. M2Z'S PUBLIC INTEREST CLAIMS ARE BASED ON FLAWED ASSUMPTIONS.

Despite the clear infirmities in its proposal raised by CTIA and other parties, M2Z in its Opposition reiterates its plan's alleged public interest benefits. In doing so, M2Z **fails** to address the many critical flaws in its public interest analysis. First, subsidization of M2Z by the government **through** a grant of exclusive licensing rights outside the auction process is inappropriate and would unfavorably tilt the competitive balance for commercial wireless service. Second, M2Z's proposal to deliver wireless broadband services is of limited benefit as such services – at higher speeds than M2Z proposes – are available today to the American public from a variety of sources. And finally, M2Z's proposal to deliver a “free” service is undermined by the realities of ancillary access costs and the practical technical limitations of wireless data service. When carefully scrutinized, it is readily apparent that the public interest benefits cataloged by M2Z are illusory.

A. M2Z Is a For-Profit Venture that Does Not Warrant a Government Subsidy.

In its Petition to Deny, CTIA noted that M2Z is a for-profit venture that does not warrant

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See, e.g., News Release, Sprint Nextel Announces 4G Wireless Broadband Initiative with Intel, Motorola, and Samsung, Aug. 8, 2006, *at* <http://www2.sprint.com/mr/news/atl.do?id=12960> (last visited Apr. 1, 2007) (announcing selection of WiMax, a TDD-based technology, as the technology for their 4G wireless broadband network that will utilize their 2.5 GHz spectrum).

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See, e.g., Press Release, Intel, Clearwire to Accelerate Deployment of WiMax Networks Worldwide, Oct. 25, 2004, *at* <http://www.clearwire.com/company/news/10-25.04-1.php> (last visited Apr. 1, 2007) (announcing intention to deploy WiMax).

a governmental subsidy to compete in the wireless broadband marketplace.⁵⁵ In response to this point, M2Z argues that: (1) many of CTIA's members obtained **cellular spectrum licenses** without participating in an **auction**;⁵⁶ (2) the Commission grants thousands of licenses per year without holding an **auction**;⁵⁷ and (3) its Application will permit new entry into the market and spur **competition**.⁵⁸ M2Z's response is unavailing and unresponsive.

First, with the exception of initial cellular licenses assigned prior to the FCC's receipt of competitive bidding authority, CTIA members have obtained their commercial wireless licenses at **auction**.⁵⁹ Indeed, if auction authority were available when those licenses were issued, it is abundantly clear the Commission would have used that licensing **mechanism**.⁶⁰ Moreover, pre-auction cellular applicants were subject to either comparative hearings or lottery processes prior to grant of their initial licenses.⁶¹ Licenses were not: (1) issued to the first **party** that applied, (2) on a nationwide basis, or (3) without grant of competing applications, as M2Z here

⁵⁵ See CTIA Petition to Deny at 3.

⁵⁶ See M2Z Opposition at 110.

⁵⁷ *Id.*

⁵⁸ See *id.* at 102.

⁵⁹ Even if the original licenses were not awarded through auction, CTIA's members have purchased many of these cellular licenses through subsequent private transactions.

⁶⁰ Following the receipt of auction authority, the Commission scheduled and held an auction for mutually exclusive cellular unserved area applications with 14 licenses granted to 10 applicants for better than \$1.8 million. See *Cellular Unserved Areas Auction Closes, Winning Bidders in the Auction of 14 Licenses to Provide Cellular Service in Unserved Areas*, Public Notice, DA 97-153 (Jan. 22, 1997).

⁶¹ See e.g., *Amendment of Part 22 of the Commission's Rules to Provide for the Filing and Processing of Applications for Unserved Areas in the Cellular Service and to Modify other Cellular Rules*, First Report and Order and Memorandum Opinion and Order on Reconsideration, 6 FCC Rcd 6185, ¶ 75 (1991).

requests. In addition, prior to accepting cellular license applications, the Commission conducted a *rulemaking* process to adopt appropriate service rules for those licenses.⁶²

M2Z's second argument that thousands of licenses each year are issued by the Commission without an auction is equally unavailing. Many of these licenses are for shared use of spectrum⁶³ or do not involve mutually exclusive applications,⁶⁴ and thus are not subject to the auction mandate. CTIA is unaware that any of these licenses are granted for "the provision of commercial services"⁶⁵ and M2Z provides no such examples in its *Opposition*.⁶⁶

M2Z also argues that its request would permit new entry into the marketplace and spur competition.⁶⁷ This argument has been consistently refuted by the Commission itself. Just in the last week, Chairman Martin noted that the wireless industry is "the most competitive" of all telecommunications industries regulated by the Commission.⁶⁸ The Eleventh Wireless Competition Report found robust competition among wireless providers, with competing

⁶² See *An Inquiry Into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems; and Amendment of Parts 2 and 22 of the Commission's Rules Relative to Cellular Communications Systems*, Report and Order, 86 FCC 2d 469 (1981).

⁶³ See *e.g.*, 47 C.F.R. § 90.179.

⁶⁴ For example, licenses issued on a site-by-site basis, with full coordination by private frequency coordinators for individual, localized communications needs, generally do not result in mutual exclusivity. See *e.g.*, 47 C.F.R. §§ 90.175, 101.103.

⁶⁵ See M2Z *Opposition* at 110-111.

⁶⁶ *Id.*

⁶⁷ See M2Z *Opposition* at 102.

⁶⁸ See Todd Spangler, *Martin: Broadband Wireless Must Be On 'Same Footing'* MULTICHANNELNEWS, Mar. 27, 2007, at <http://www.multichannel.com/article/CA6428126.html> (last visited Apr. 2, 2007).

broadband wireless services available to 94 percent of the population.⁶⁹ M2Z has failed to demonstrate that a government handout of spectrum to it would provide any more meaningful competition for wireless broadband services than what exists today.

All of M2Z's arguments miss a key issue made in CTIA's Petition to Deny: namely, that in the robustly competitive wireless marketplace where licensees pay an upfront spectrum auction fee to enter the market, authorizing a new entrant excused from this start-up cost would only distort existing competition. Given that the wireless sector is consistently cited as a successful example of market forces at work, the Commission should not alter the existing competitive balance. Instead, the Commission should reject M2Z's attempt to secure an unfair advantage through government fiat.

B. High Speed Broadband Services Are Being Rapidly Deployed and Are Increasingly Available.

M2Z touts the delivery of nationwide broadband service as a significant benefit of its proposal. However, as CTIA noted in its Petition to Deny, high speed broadband services, including wireless broadband services, are widely available throughout the country, with the Commission finding that 59% of new net broadband additions were wireless.⁷⁰ M2Z ignores these arguments. The Commission recently found that 5

The Commission cannot ignore that wireless broadband services are being provided by numerous wireless providers (Alltel, Verizon Wireless, T-Mobile, AT&T, Sprint Nextel, Clearwire, among others) at data rates that in many cases greatly exceed the 384 kbps data rate

⁶⁹ See Eleventh Competition Report at ¶¶ 116-117.

⁷⁰ See CTIA Petition to Deny at 11. See also *High-speed Services for Internet Access: Status as of June 30, 2006*, FCC Wireline Competition Bureau, at 3-4 (Jan. 2007), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-270128A1.pdf.

that M2Z proposes as its “free” speed for customers.⁷¹ Indeed, as indicated above, wireless broadband services are the fastest growing of any broadband service and currently are widely available in counties covering the vast majority of the population.⁷²

With this level of competition, customer needs for wireless broadband service can readily be met by the commercial marketplace. M2Z’s arguments that current broadband deployment is “not acceptable” are thus without merit and refuted by commercial reality.

C. M2Z’s Proposed Service Is Not “Free”

M2Z reiterates its arguments that it would provide a free, portable broadband internet access service.⁷³ However, the service will not be free of cost to users. Ancillary access requirements and the technical limitations of the service will both impose costs.

First, parties desiring to access M2Z’s service will be required to purchase customer premises equipment (“CPE”) that will cost at least \$250 by M2Z’s own estimate.⁷⁴ Yet, M2Z has failed to provide any documentation or proposed equipment demonstrating that such equipment exists or will be available. M2Z has not identified any manufacturer, nor provided any manufacturer contract, that demonstrates there will be products available at this price point. Without such a showing, there is no way to determine if such a price point or the scale necessary to provide nationwide CPE to consumers is even possible. The Commission cannot simply accept M2Z’s unsupported claims as a basis for authorizing use of extremely valuable AWS spectrum.

⁷¹ See *infra* n.52.

⁷² See *infra* Section II.

⁷³ See M2Z Opposition at 99.

⁷⁴ See M2Z Opposition at 17.

IV. M2Z'S ALLEGATIONS OF PROCEDURAL INFIRMITIES IN THE OPPOSING FILINGS ARE OVERSTATED AND DO NOT WARRANT THE DISMISSAL OF THESE FILINGS.

M2Z alleges that all of the opposing filings suffer from one or more of the following procedural defects: failure to serve, failure to include affidavits, failure to make *prima facie* showing, and failure to plead facts demonstrating standing. However, the procedural infirmities M2Z alleges are generally overstated or simply wrong. They certainly do not form a basis for the Commission to dismiss the petitions to deny and competing applications.

First, M2Z's request for the dismissal of opposing filings for **failure** to serve M2Z is trivial and ignores relevant Commission precedent.⁷⁵ The Commission has consistently excused parties for failure to serve and other minor infirmities when the procedural mistake is "harmless" and does not "prejudice" the other party.⁷⁶ Specifically with regard to CTIA, M2Z was served.⁷⁷ Further, the failure to "serve" did not harm M2Z or disadvantage it in any way. Indeed, the length of M2Z's Opposition and its reference to specific filings, indicates that it had ample opportunity to obtain and respond to these filings. The extended comment cycle also gave it adequate time to do so.⁷⁸ M2Z also acknowledges in an ex parte filing dated March 14—two

⁷⁵ See M2Z Motion at 13.

⁷⁶ See *Licenses from WorldCom, Inc. to Nextel Spectrum Acquisition Corp.*, Memorandum Opinion and Order, 19 FCC Rcd 6232, ¶ 18 (2004); See generally *Bay Ventures Application for Renewal of 220 MHz Radio Station WPCX637, Key Largo, Florida*, Order, 17 FCC Rcd 8766, ¶ 9 (2002); *AT&T Corp., MCI Telecomm. v. Bell Atlantic—Pennsylvania*, Memorandum Opinion and Order, 14 FCC Rcd 556, n.254 (1998) (finding that because the party "suffered no prejudice, [the FCC] need not address its claim that the notice was defective").

⁷⁷ In fact, on March 2, 2007 – within hours of filing its Petition to Deny – CTIA sent an e-mail to a M2Z representative summarizing the filing and including a web link to the full text of the pleading on the Internet. See, http://files.ctia.org/pdf/filings/070302_CTIA_Petition_to_Deny_M2Z_Application.pdf

⁷⁸ The Commission set the deadline for filing Petitions to Deny for March 16, 2007. However, most petitioners—including CTIA—and competing applicants filed on March 2, 2007

Commission procedures. CTIA simply believed that an affidavit was not necessary to make its legal arguments.

Third, the commission also should disregard M2Z's charge that **all** of the Petitions and competing Applications must be dismissed because the Petitioners and Applicants failed to make a *prima facie* showing that approval of M2Z's Application would be inconsistent with the public interest.' CTIA's Petition to Deny, as well as the filings of the other petitions, articulated many serious legal and indisputable factual flaws with M2Z's Application that all demonstrate how M2Z's proposal is inconsistent with existing law and the public interest. M2Z's suggestion that such arguments fail to make a *prima facie* case is simply correct.

Finally, M2Z's two-sentence assertion that CTIA "simply cit[ed]" a case and failed to present factual support that CTIA is a "party in interest" is **disingenuous**.⁸² CTIA clearly explained at the beginning of its Petition to Deny that CTIA's filing was "on behalf of its members who purchased at auction Personal Communications Service ("PCS") and Advanced Wireless Service ("AWS") licenses."⁸³ CTIA then detailed that these members "would compete in the exact same geographic and product space with M2Z, and . . . would be harmed by a Commission decision to distort the competitive market for commercial wireless services by

⁸¹ See M2Z Motion at 13 (citing 47 U.S.C. § 309(d)).

⁸² See *id.* at n.58.

⁸³ See CTIA Petition to Deny at 1. CTIA also provided the clear legal principles that justified CTIA's standing to file on behalf of its interested members. CTIA stated that it "has standing based on associational standing principles. Under associational standing principles, an association has standing in a proceeding so long as: (1) at least one of its members has standing to sue in its own right; (2) the interests the association seeks to protect are germane to its purpose; and (3) neither the claim asserted nor the relief requested requires the participation of an individual member in the lawsuit. See, e.g., *Am. Library Ass'n v. FCC*, 401 F.3d 489 (D.C. Cir. 2005)." See CTIA Petition to Deny at n.4. Because CTIA's members had standing to file petitions to deny and CTIA was protecting the interests of these members, CTIA also had standing to file a petition to deny.

providing M2Z with free (or installment plan) spectrum in lieu of conducting open, competitive auctions.”⁸⁴ The Commission should thus ignore M2Z’s patently incorrect assertion that CTIA failed to demonstrate that it is a **party** in interest.

V. CONCLUSION.

For these reasons and the many others raised by all petitioners in this proceeding, the Commission should promptly dismiss or deny M2Z’s Application for a license in the 2155-2175 MHz band as well as M2Z’s Petition for Forbearance.

Respectfully submitted,

By: /s/ Christopher Guttman-McCabe

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⁸⁴ See CTIA Petition to Deny at 1-2.

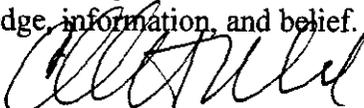
**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
M2Z NETWORKS, MC.)	
Application for License and Authority to)	
Provide National Broadband Radio Service In)	WT Docket No. 07-16
the 2155-2175 MHz Band)	
Petition of M2Z Networks, Inc. for Forbearance)	
Under 47 U.S.C. § 160(c) Concerning)	
Application of Sections 1.945(b) and (c) of the)	WT Docket No. 07-30
Commission's Rules and Other Regulatory and)	
Statutory Provisions)	

**AFFIDAVIT OF CHRISTOPHER GUTTMAN-MCCABE IN SUPPORT OF
REPLY OF CTIA - THE WIRELESS ASSOCIATION@**

I, Christopher Guttman-McCabe, do hereby declare under penalty of perjury the following:

1. I am Vice President for Regulatory Affairs of CTIA - The Wireless Association@.
2. I have read the foregoing Reply of CTIA - The Wireless Association@ and the CTIA - The Wireless Association@ Petition to Deny that was filed on March 2, 2007, and any facts stated therein, of which the Federal Communications Commission may not take official notice, are true and correct to the best of my knowledge, information, and belief.

Signature: 
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Date: 4/3/07

Subscribed and sworn to before me this 3rd day of April, 2007.

Notary Public: Sanjeev K. Christopher 4/3/07

My Commission Expires: 11/14/2011

Residing at: District of Columbia

Sanjeev K. Christopher
Notary Public, District of Columbia
My Commission Expires 11/14/2011

CERTIFICATE OF SERVICE

I, Brian Josef, do hereby certify that on this 3rd day of **April 2007**, I caused copies of the foregoing **“Reply of CTIA – The Wireless Association®”** to be delivered to the following via First Class U.S. mail and/or email.

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